2006

PDC Consulting, Inc. v. Jared Porter : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PDC CONSULTING, INC., Plaintiff and Appellant, vs. JARED PORTER, Defendant and Appellee.	**BRIEF OF THE APPELLANT** **PDC CONSULTING, INC.** No. 20060920-CA Fourth District Court, American Fork Civil No. 050100017

APPEAL FROM THE FINAL JUDGMENT OF THE FOURTH DISTRICT COURT, UTAH COUNTY JUDGE DEREK PULLAN

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I. **TABLE OF AUTHORITIES**

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II. JURISDICTION

The Utah Court Of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j), by transfer from the Utah Supreme Court. The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(2)(j).

III. STATEMENT OF THE ISSUES

Issue No. 1 - Was the trial court's April 4, 2006 Order the result of a mistake as to the Length of Time that had elapsed?

Standard of Review: Whether the trial court's April 4, 2006 order was sufficiently founded in fact is judged by a clearly erroneous standard of review. *See* State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

This issue was preserved at R.732: page 9/ line 24 et seq.

Issue No. 2 - Did the Appellant's entry of a certificate of readiness render moot the issue of failure to prosecute?

Standard of Review: Whether there is a justiciable controversy before a trial court is governed by a correction of error standard. *See* Shipman v. Evans, 2004 UT 44, ¶32.

This issue was preserved at R.732: page 10/ line 22 et seq; page 12/ line 10 et seq; page 14/ line 11 et seq.

Further, issues involving the separation of powers between branches of government involve exceptional circumstances warranting judicial review on appeal. *See* Salt Lake City v. Ohms, 881 P.2d 844, 847, 866 (1994). Advisory opinions or non-

justiciable controversies offend the the separation of powers doctrine and so create exceptional circumstances warranting appellate review. *See* Miller v. Weaver, 2003 UT 12, ¶26.

Issue No. 3 - Did The Court Abuse Its Discretion In Dismissing For Want Of Prosecution?

Standard of Review: Whether a trial court properly dismissed a case for want of prosecution of governed by an abuse of discretion standard. *See* Hartford Leasing Corporation v. State, 888 P.2d 694, 697 (Utah Ct. App. 1994).

This issue was preserved at R.732: page 9/ line 24 et seq.

IV. STATEMENT OF THE CASE

A. Nature of the Case

The Defendant/Appellee Jared Porter was formerly employed by the Plaintiff/Appellant PDC as a graphic designer. Previous to his employment with PDC Porter was employed by PDC's largest client. At the time he was employed by PDC 1999 it paid him double what he had been previously earning. That employment was governed by an employment agreement which included a non-compete provision and made all of Porter's design work produced for PDC a work for hire. In February of 2000 Porter became romantically involved with one of the account managers for PDC's largest client. Porter and that account manager arranged for him to surreptitiously perform graphic design work for that client. Throughout this time Porter was secretly burning CDs

containing PDC's proprietary graphic design work and graphic design tools. In January of 2001 Porter abruptly terminated his employment with PDC and took the CDs with him. PDC then reviewed the files on the computer Porter had used and discovered that he had been doing work on his own account for PDC's largest client. PDC sued Porter and obtained a pre-judgment writ of replevin. Porter's laptop computer was seized along with 39 CDs with handwritten labels indicating they contained proprietary work performed for PDC's client. The parties entered into an April 15, 2001 agreement stipulating the terms upon which PDC's claims against Porter would be settled. Under its terms the Defendant was to account to Plaintiff for all money paid to him by Plaintiff's client and to make full disclosure of all of his dealings with third parties regarding the Defendant's work for that client. However, when deposed the Defendant refused to make that accounting and repeatedly testified he could not recall particulars of his dealings with the client.

B. **Course of the Proceedings**

April 6, 2001	Appellant filed a complaint, a motion for a pre-judgment writ of replevin, six supporting affidavits, an ex-parte motion for a TRO, a memorandum in support of a motion for a TRO and a motion for expedited discovery, and a motion for leave to file an over-length memorandum.
April 6, 2001	The trial court issued a TRO, order authorizing expedited discovery, an order granting leave to file an over-length memorandum, an order authorizing a pre-judgment writ of replevin.
April 15, 2001	An agreement is signed specifying the terms that must be complied with by the Defendant Porter for him to be released from Plaintiff's claims in this action.
April 16, 2001	A hearing on the TRO is held, counsel appearing for both parties and that hearing is continued to May 11, 2001.

May 7, 2001	A stipulation is filed with the court specifying the terms for the copying of the hard drive on the Appellee`s computer and for the re-delivery of that computer to the Appellee.
May 7, 2001	An order approving that stipulation issues that same day.
May 11, 2001	The TRO hearing is continued to June 18, 2001 at counsel`s request.
June 18, 2001	Counsel for Porter fails to appear at the TRO hearing. Counsel for the Appellant addresses the court as to a possible settlement and requests and evidentiary hearing.
August 14, 2001	The evidentiary hearing scheduled for this date proceeds after the advice to the court by counsel for the Appellee that the case has settled. Appellant's CEO is examined by counsel for the Appellee.
April 9, 2003	Appellee moves to enforce the agreement on settlement terms.
May 10, 2003	Appellant moves to set aside the settlement.
November 26, 2003	The court denied the Appellee's motion to Enforce the Agreement on settlement terms and Motion for Costs. It also denied the Appellant`s motion to set aside the agreement on settlement terms.
October 27, 2004	The court issues an OSC re: dismissal returnable before the court November 30, 2004.
November 30, 2004	Counsel for the parties appear and the court orders discovery to be completed within 90 days.
March 1, 2005	A stipulation by the parties to extend the time for discovery is filed.
April 4, 2006	The court orders that a Certificate of Readiness for Trial be filed with the court by April 30, 2006 or the case will be dismissed without further notice.
April 28, 2006	Appellant fax-files a certificate of readiness to the trial court.
May 8, 2006	Appellee/Defendant objects to the certificate of readiness arguing that it has not had sufficient opportunity to complete discovery.
August 09, 2006	Appellant's motion to strike and amended motion to strike the

	Appellee Porter's Objection is fax-filed with the trial court.
August 10, 2006	Appellant/Plaintiff's motion to strike the Appellee/Defendant's Objection is filed.
August 10, 2006	The court rules that the case should be dismissed with prejudice.
August 31, 2006	Appellant objects to the proposed form of order dismissing the case with prejudice.
September 5, 2006	Order dismissing the case with prejudice for want of prosecution.
October 5, 2006	Notice of Appeal filed.

C. **Disposition at the Trial Court**

After a certificate of readiness for trial is entered, the Appellee Porter moved to dismiss the case with prejudice and that motion is granted.

V. RELEVANT FACTS

A. **Facts about the Case**

In June of 2001 Jared Porter was deposed by PDC and a disagreement arose between the parties whether Porter was performing as promised under the terms of the April 15, 2001 agreement to settle the Plaintiff's claims against Porter. On April 9, 2003 Porter moved to enforce the agreement on settlement terms. R. 0310. PDC responded by moving to set aside the agreement on settlement terms. R. 0373. This litigation culminated in an order of Judge Lynn Davis dated November 26, 2003 in which he refused to enforce the agreement on settlement terms. Instead, the parties were directed to pursue discovery. R. 0619. After Judge Davis's order, Judge Derek Pullan assumed

conduct of the case.

Pursuant to an order of Judge Pullan dated November 30, 2004, discovery in this case was to have been conducted during 2005. Despite stipulations by the parties to extend the time for discovery, neither party commenced discovery. On March 14, 2006 Judge Pullan issued an Order to Show Cause, returnable before the court in American Fork on April 4, 2006 at 9 a.m., requiring the parties to show cause why the case should not be dismissed. R.0637. At that hearing the court took into account the eighteen months delay in prosecuting the case (actually only sixteen months). R. 0733; page 5/ line 7. The court then ordered that certificate of readiness or scheduling order be filed with the court by April 30, 2006. On April 28, 2006 a certificate of readiness was fax-filed by PDC's counsel. R. 0641.

On May 8, 2006 Porter objected to the entry of the Certificate of Readiness and moved to dismiss the case, alleging that Porter had not yet filed an answer, that there had been no opportunity for discovery, that PDC had failed to challenge the settlement within the time limited, that the issue of settlement was yet to be litigated and that PDC's only remedies would sound in contract. R. 0682. In substance, Porter's motion alleged that the trial court had mistakenly believed that only a short time had elapsed since the last hearing before the court, when in fact there had been no steps taken in the case from November 30, 2004 to April 4, 2006, and that the court had on the basis of that mistaken belief directed the entry of the certificate of readiness. Porter's motion also claimed that the enforceability of the agreement on settlement terms was a predicate to any trial on the

merits and that because the November 3, 2003 order had denied the PDC's motion to set aside the settlement, the entry of the certificate of readiness was in error. In fact, the court decided in its November 26, 2003 order denied both parties motions for summary judgment on the issue of enforceability of the April 15, 2001 agreement on settlement terms, ruling that material issues of disputed fact remained. R. 0623. The trial court specifically relied upon Porter's factual misstatements in reversing its prior order and dismissing the case with prejudice. R.732: page 23/ line 19 et seq. However, no order striking the certificate of readiness has ever been entered.

VI. SUMMARY OF ARGUMENT

Under Utah law settlement agreements are executory and until the terms of a settlement agreement are fulfilled there is no settlement. PDC's settlement agreement with Porter specifically contemplated Porter being deposed under oath and fully disclosing all details regarding his involvement with third parties in his wrongful appropriation of PDC's business interests and proprietary information. Porter was deposed under oath and as a result of that deposition PDC maintained that it was apparent Porter was refusing to make the disclosure promised. Subsequently, Porter moved to enforce a settlement agreement and PDC responded by moving to set the settlement agreement aside. Judge Davis ruled that there were material disputed issues of fact that prevented summary judgment on the issue of whether the settlement agreement was enforceable and directed the parties to litigate that issue.

Judge Davis's order by its terms placed just as great an onus on Porter as PDC to litigate that issue. Although PDC had already conducted extensive discovery on that issue, subsequent to November 30, 2004 neither party took any steps to litigate that issue and when on April 4, 2006 an OSC hearing was held before Judge Pullan he specifically noted that eighteen months had elapsed since the November 30, 2004 order, thus establishing that there was no confusion in his mind about the length of time that elapsed without activity by either party.

Judge Pullan ordered that a certificate of readiness or a scheduling order be filed by April 30, 2006, and PDC complied by filing a certificate of readiness on April 28, 2006. That certificate of readiness was properly filed because PDC had performed all the discovery necessary to prosecute its case against Porter and Porter had for almost two and one half years done nothing to advance his case, because Judge Davis had previously ruled that whether the case had been settled could not be resolved without a trial and because since November 26, 2003 Porter had known he needed to file an answer but had failed to do so. Further, PDC's filing of the certificate of readiness rendered the issue of failure to prosecute moot, especially when Porter's failure to move for the entry of a scheduling order is considered.

Instead, Porter waited to see whether PDC would file a certificate of readiness. When it did Porter objected. That objection sought re-litigate the issue of failure to prosecute by falsely alleging that PDC was solely responsible for the eleven month delay that had accrued. Porter also moved to collaterally attack Judge Davis's November 26,

2003 order by asking Judge Pullan, in effect, to rule that because the enforceability of the settlement agreement had not been further litigated, and because Porter had not taken the opportunity to conduct discovery on the enforceability of the settlement agreement, Judge Pullan should rule that PDC had failed to prosecute its claim that the settlement agreement was not enforceable and so its entire case against Porter must be dismissed.

In addition to the lapse of time there are five factors that must be employed by a trial court in exercising its discretion to dismiss a case for failure to prosecute. These are: (1) the conduct of both parties; (2) the opportunity available to each party to move the case forward; (3) what each party has accomplished in moving the case forward; (4) the difficulty or prejudice imposed on the opposing party by reason of the delay; and (5) most important, whether injustice may result from the dismissal. Plainly, when a certificate of readiness had already been filed, when there was no reasonable basis for re-litigating the trial court's April 4, 2006 order and when Porter had clearly been much more negligent than PDC in prosecuting the action, it was an abuse of discretion for the trial court to accept Porter's repeated misstatement of the facts controlling the procedural posture of the case and dismiss PDC's claims by relying on Porter' misstatements.

VII. ARGUMENT

A. THE TRIAL COURT'S ORDER DIRECTING ENTRY OF A CERTIFICATE OF READINESS WAS PROPERLY MADE

In making its order for the entry of a certificate of readiness (or entry of a scheduling order) the trial court was well aware that a lengthy period of time had elapsed

since its order of November 30, 2004. The court refers to this lapse of time as eighteen months (when actually it was sixteen months).[1] The court then noted that the 90 day period provided for discovery had elapsed. And, contrary to Porter's representations to the court on August 10, 2006,[2] the court specifically noted that the parties had stipulated to an extension of discovery to April 30, 2005 by stating "And then there's an extension, there's an agreement for an extension of time to April 30th in the file, 2005."[3] The court then advised that a notice of readiness be filed "after that" on April 30, 2006. If, as counsel for Porter maintained, the court was under the misapprehension that the stipulation for discovery ran through April 30, 2006, the court would have selected a date after April 30, 2006 for the filing of a notice of readiness for trial. But it selected April 30, 2006, which confirmed that it was aware that the stipulation had already expired.

Even if the trial court was momentarily confused as to whether the stipulation was still in place, that was neither here nor there because the trial court in any event set April 30, 2006 as the date for the entry of a certificate of readiness, which was only 24 days subsequent to the hearing date. It is apparent then that any momentary confusion as to the operation of the stipulation for discovery did not result in the extension of the time for discovery nor did it result in the trial court extending the time for the next step in the action. Instead, the trial court required the entry of a certificate of readiness by the end of

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[1]R.733: page 5/ line 7.

[2]R.732: page 7, line 18. At the August 10, 2006 hearing Porter's counsel erroneously stated "[I]n your hearing with Mr. Ady just a few months ago you said your understanding was that my stipulation ran through April 30, 2006."

[3]R.733: page 6/line 3.

April 2006, which was only a few weeks after the April 4, 2006 hearing.

The record of the April 4, 2006 hearing unequivocally shows that the trial court was aware of the amount of time that had transpired between November 30, 2004 and April 30, 2006. In fact, the court overestimated that time. The court also specifically identified April 30, 2005 as the date the stipulated extension of discovery expired. Accordingly, the court's order of April 4, 2006 requiring the entry of a certificate of readiness by the end of the month was not (as erroneously claimed by Porter at the August 10, 2006 reconvened hearing)[4], entered by mistake. In making that order the trial court specifically took into account the lapse of time from November 30, 2004 to April 4, 2006 and clearly identified April 30, 2005 as the date when discovery terminated.

B. THE TRIAL COURT ERRED IN LAW IN REVERSING ITS APRIL 4, 2006 RULING AT THE RECONVENED AUGUST 10, 2006 OSC HEARING.

When on August 10, 2006 the trial court reconvened the April 4, 2006 OSC hearing,[5] Porter's objection to the filing of a certificate of readiness was argued. Porter erroneously alleged that the certificate of readiness misstated the facts and so had been improperly filed.[6] Analysis of each of the matters certified by PDC shows they were properly certified.

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[4]At the August 10, 2006 hearing Porter's counsel erroneously stated "[I]n your hearing with Mr. Ady just a few months ago you said your understanding was that my stipulation ran through April 30, 2006." p. 7, line 18.

[5]R.732: p. 20/ line 21 et seq.

[6]R.732: page 8/ line 4 et seq.

1. All necessary pleadings had been filed. Once Judge Davis had made his order of November 26, 2003 a responsive pleading was in order from Porter. Porter cannot now complain because he did not file a responsive pleading nor should he be allowed to obstruct the entry of a certificate of readiness because of his failure to file a responsive pleading. In that case, it was appropriate for plaintiff to certify that all necessary pleadings had been filed. There is no rule of law that states that a defendant must file a responsive pleading before a case can go to trial on the merits. Absent from Porter's caviling that he has never filed an answer is any showing of prejudice to Porter because of this defect. Because Porter defaulted in making any showing of prejudice due to his failure to file an answer, he could make no objection to the certificate of readiness on this basis.

2. Counsel had completed all discovery. This too was an appropriate certification by PDC.'s counsel. The amount of discovery to be conducted in any civil case is in the discretion of the parties. If the parties choose to forego discovery that is in their discretion. As was admitted by Porter at the August 10, 2006 hearing, PDC had already deposed Porter for 14 hours. It was Porter that had decided not to conduct any discovery whatsoever. Further, as Porter also admitted at the August 10, 2006 hearing, and in fact vigorously asserted, that discovery cutoff of April 30, 2005 had long since passed. Accordingly, all discovery had been completed and it was appropriate to certify the case ready for trial.

Again, Porter failed to show any prejudice because of this certification. Porter had

known since November 26, 2003 that the court had denied his motion for summary judgment on his claim that the agreement on settlement terms had been fully satisfied by him. As of that date he was on notice that if he wished conduct discovery on that issue (or on the merits of the case), he must proceed. But in the almost two and one half years until April 4, 2006 Porter chose to conduct no discovery. A party's own refusal to act cannot be the cause of prejudice to that party. Porter's objection to the certificate of readiness on this basis was unfounded.

3. Settlement discussions have been pursued by counsel, but no settlement has been effected. Under Utah law settlement agreements are executory.[7] And in this case the November 26, 2003 order of Judge Davis had specifically found that material issues of fact remained on the issue of whether the case had been settled and that a lengthy evidentiary hearing would have to be held to resolve that issue. By force of definition, if both parties have moved for summary judgment on the issue of whether settlement had been effected and the court had ruled that because material issues of fact remained it could not grant either party's motion, a trial is necessary to resolve that issue. Until that trial resolves those disputed issues no settlement has been effected. This was an appropriate certification. Further, Judge Pullan in his April 4, 2006 order did not limit the scope of the certificate of readiness to a trial on the issue of settlement but refer generally to a certificate of readiness, thus indicating that he wanted the case set down for trial on

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[7]*See* Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078,1082 (Utah 1985). Only upon completion of the substituted performance agreed to by the parties to the agreement will the settlement agreement extinguish the underlying claim. *See* Bradshaw v. Burningham, 671 P.2d 196,198 (Utah 1983).

all issues that remain to be determined.

Because of Porter's repeated, erroneous assertions on August 10, 2006 that at the April 4, 2006 hearing the court had misapprehended the length of the delay in the case, the trial court mistakenly reversed its order directing that a certificate of readiness be entered because Porter failed to appear at the April 4, 2006 OSC hearing. This was done despite PDC's counsel's advice that his recall was that the court had been aware of the length of the delay.[8] This reversal by the trial court was improper because it was based on Porter's erroneous allegations on what had occurred at that April 4, 2006 hearing. It was also improper for a number of other reasons.

First, Porter with his objection filed a belated motion to dismiss. Note that the trial court on March 14, 2006 had issued its OSC. Yet Porter filed nothing in advance of that motion. In particular, he did not file a motion to dismiss, although all the grounds asserted (erroneous though they may be) that were asserted in his May 8, 2006 motion to dismiss (also styled as an objection) could have been brought by a motion to dismiss filed prior to April 4, 2006. But it was only after he was confronted with a certificate of readiness for trial that Porter filed his motion to dismiss.

More importantly, Porter's motion to dismiss was filed after PDC had filed the certificate of readiness. Porter could have immediately filed his objection/ motion to dismiss the court's April 4, 2006 order directing the entry of a certificate of readiness (or a scheduling order), but waited until after PDC had taken the next step in prosecuting its

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[8]R.732: page 10/ line 2.

case and had filed a certificate of readiness. By then PDC had performed the very act required by the trial court to timely move the case toward trial (i.e. file a certificate of readiness) and this made the issue of failure to prosecute moot. A moot claim has lost its ability to provide judicial relief to the litigants.[9] By taking the next step to prosecute the case (a step which was specifically directed by the trial court), PDC moved the case forward which meant that there was no longer a failure to prosecute by PDC and that issue had been rendered moot.

This meant that when the OSC hearing was reconvened on August 10, 2006 there was no longer a failure to prosecute by PDC and that there was no justiciable controversy regarding Porter's untimely motion to dismiss.[10] Because there was no longer a justiciable controversy on the issue of failure to prosecute, all that was left for consideration by the trial court was Porter's objection to the entry of the certificate of readiness. The issue of mootness may be raised sua sponte by a trial court.[11] In that regard, it seems the question of mootness falls into the same category as a lack of subject matter jurisdiction.[12] Both of these procedural defects militate against a court's further considering a matter, because to do so would result in the rendering of an advisory

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[9]Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶16, 48 P.3d 968 (Utah 2002).

[10]Shipman v. Evans, 2004 UT 44, ¶32.

[11]Id. at ¶36.

[12]*See* Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986) where the court stated: "At the outset, we note that acquiescence of the parties is insufficient to confer jurisdiction and that a lack of jurisdiction can be raised at any time by either party or by the court."

opinion.[13] Accordingly, when during the August 10, 2006 hearing the trial court considered the question of PDC's failure to prosecute the action before it, it did so improperly because that issue had already been rendered moot.[14]

C. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PDC'S CLAIMS

Hartford Leasing Corporation v. State[15] provides the rule to be applied in this case in determining whether the Plaintiff's case was subject to dismissal for failure to prosecute. There this Court reviewed and then applied the five factors controlling the exercise of a trial court's discretion in determining whether it should dismiss an action. The five factors identified were: (1) "the conduct of both parties"; (2) the opportunity available to each party to move the case forward; (3) what each party has accomplished in moving the case forward; (4) the difficulty or prejudice imposed on the opposing party by reason of the delay; and (5) "most important, whether injustice may result from the dismissal."[16]

In applying these factors to this case it must be remembered that the only delay at issue before the trial court on August 10, 2006 was the eleven months of delay accruing since the expiration of the April 30, 2005 discovery cut-off. The previous delay in

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[13]Christiansen v. Farmers Ins. Exch., 2005 UT 21, ¶6.

[14]R.732: p. 12/ line10 - 25; p. 13/ line 9; line 11 - 18.

[15]888 P.2d 694 (Utah Ct. App. 1994).

[16]Id. at 697.

prosecution of the case, which had accrued up until the trial court's order of November 30, 2004 was not considered by the trial court at the Order to Show Cause hearing on April 4, 2006. The only delay considered by the trial court at that April 4, 2006 hearing were the eighteen months (actually sixteen months) that the trial court stated had accrued from November 30, 2004 until April 4, 2006.[17] As to that sixteen months, five of those months that had accrued had been designated for discovery and only eleven of those months were months that had not been scheduled by the trial court. It was this eleven months of delay in prosecuting the case that formed the basis upon which the Defendant objected to the filing of a certificate of readiness.[18]

Proper consideration of that delay requires that the procedural posture of this case be understood. The April 15, 2001 agreement signed by the parties specified the terms with which Porter must comply before Plaintiff's claims against Porter would be dismissed. This included the copying of Porter's hard drive and his making full

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[17]R.733: page 5/ line 7 et seq.

[18]*See* Def.Mem.Obj.:
p. 2 "when, in fact, that stipulation ended over a year ago on April 30, 2005.";
p. 3 "Plaintiff did nothing over the next year to challenge the settlement agreement and the court issued an Order to Show Cause . . .";
p. 4 "during this 60 day period which ended on April 30, 2005 . . .";
p. 4 "when in fact the stipulation only ran through April 30, 2005.";
p. 4 ". . . stipulated time period for Plaintiff to challenge the settlement had passed a year before.";
p. 5 "Plaintiff did nothing on the case for another year until an order to show cause was issued by the court.";
p. 6 "A year has passed since the last stipulated deadline for Plaintiff to challenge the settlement . . ."
Unfortunately, this memorandum does not appear to be included in the appellate record. The motion which this memorandum supports is at R.682.

disclosure to the Plaintiff under oath in a deposition of all facts regarding his appropriation of PDC's client, its proprietary information and the persons involved with him in that misappropriation. On June 14 and 29 of 2001 Porter was deposed on those matters. Almost immediately the parties were in disagreement about Porter's conduct during the deposition. Plaintiff believes it is obvious from the deposition transcripts that Porter was being non-cooperative and obstructive. He is clearly a hostile witness.

For example, under the terms of the agreement on settlement terms Porter is not released from liability until a permanent injunction is obtained prohibiting him from making any further use of PDC's data or soliciting further work from any of PDC's clients. However, performance of this provisions was rendered moot by Porter's own malfeasance.[19] Moreover, under the terms of the agreement on settlement terms Porter was to forthwith irrevocably assign over to PDC all amounts invoiced to date to Pharmanex (see h in the settlement agreement). Yet in his deposition Porter at first

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[19]R.734:

page 177/line 22 MR. ADY: *Porter, have you accessed the CellInteractive.com Website since April 15th of this year?*

page 177/line 15 Porter: *I believe I accessed it when you provided me the password to do so, yes.*

page 178/line 15 MR. ADY: *It's the case where you can add content but can't remove it?*

page 178/line 17 Porter: *Without removing the whole thing. Unfortunately, in the current job search, I need some representation in my portfolio.*

Here is Porter's admission that he has refused to take down his Website. There was no attempt by him to take it down, and apparently no consideration given to taking down the Website, removing the PDC content and then re-erecting the site for the limited purpose of exhibiting Porter's portfolio. In any event, Porter's claim that with the key provided he could add but not remove material from his Website was later admitted to be without merit.

claimed his work for Pharmanex was performed for free,[20] but Porter also equivocates about why he was not paid by Pharmanex.[21] He stammers that payment was not forthcoming because there was a conflict between PDC and Pharmanex and then claims that he had no contract for work with Pharmanex. He admits he spoke with the COO of Pharmanex, about being paid $6,000.00 per month for his work,[22] then denies any such conversation.[23] When confronted with emails corroborating the conversation with the COO, Porter becomes frustrated.[24] Porter was also confronted with additional emails corroborating the payment arrangements.[25]

Despite Porter's contractual commitment to come clean and assist PDC in prosecuting third parties, he denies that his romantic interest (the account manager with

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[20]R.735: page 43/ line 2; page 45/ line 13; page 106/ line 24; page 107/ line 1 (not for hire); page 108/ line 15 (a mock invoice).

[21]R.734: page 97/ line 13.

[22]R.735: page 143/ line 13.

[23]R.734: page 93/ line 17.

[24]R.734: page 202/ line 13 , finds Porter becoming frustrated when referred to an E-mail where he advises a friend, "I could go back to Pharmanex for $6,000 a month." See also page 203/ line 10 where Porter voices frustration.

[25]R.734: page 205 line 15 he is referred to Exhibit 15 and his advice to a friend that he has yet to bill Pharmanex for a $10K month. On February 23, 2002 Porter advises his mother (see Exhibit 16) that he has billables and just, "[has] to wait a week to get paid." At page 208/ line 16 he admits that he was to be paid for this work. Porter in the same E-mail refers to at $12,000.00 coming to him for his last seven projects and that he is just waiting for the check. Yet when asked about this in his deposition at page 209/ line 11 Porter claims he had not yet billed Pharmanex for this work. But then at page 211/ line 18 and page 212 /line 11 reference is made to exhibits in which Porter refers to loopholes he hopes to use to get around PDC.

Pharmanex) was trying to destroy PDC's relationship with Pharmanex.[26] When again referred to Exhibit 16 and his statement in that email that, "I hope that PDC is forever blacklisted from working with Nuskin. As long as (blank) is there, she'll see to that", he asserts that Ms. (blank) was "justified in that cause since I was completing most of the work for her."[27] These are just a few of the examples of Porter's contumacious refusal to perform or execute the terms of his settlement agreement with PDC. In response, Porter claims, in substance, that he has been fully cooperative.

On April 9, 2003 Porter moved to have the agreement on settlement terms deemed completed by Porter. On May 10, 2003 PDC filed a cross-motion to have the agreement settlement terms declared void because of Porter's refusal to perform his obligations under it. On November 26, 2003 Judge Lynn Davis, who prior to Judge Pullan had conduct of the case, denied both motions by ruling:

> "Because this Court finds that genuine issues of material fact exist, neither party is entitled to judgment as a matter of law. Counsel for plaintiff is instructed to prepare an order denying its motion. Counsel for defendant is instructed to prepare an order denying his motion consistent with this opinion. It is this Court's opinion that a lengthy evidentiary hearing is probably implicated, that experts would need to be employed, and that each party might need to seek new legal counsel. In light of this opinion, the Court invites the parties to seriously reconsider the proposed resolution of the case." R. 0623.

Porter in his May 8, 2006 objection to the filing of a certificate of readiness falsely claims that the trial court denied only PDC's motion to set aside the agreement on

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[26]R.734: page 150/ line 23.

[27]at page 207, line 3

settlement terms. Obviously, under the terms of the November 26, 2003 order both parties were equally charged with prosecuting their respective claims regarding the April 15, 2001 agreement on settlement terms. It is in this context that the five factors identified in Hartford Leasing must be applied.

Neither party moved the case forward in the sixteen months from November 30, 2004 to April 4, 2006. But PDC had already prior to that time moved the case toward a conclusion. PDC has already deposed Porter for two days and has those transcripts. It has already copied his hard drive and has all the documents contained on his hard drive. It has already filed a number of affidavits in this case specifying the testimony to be proffered by the witnesses for PDC in this case. Porter in his deposition has made it clear that he is stonewalling and will not be forthcoming with further information. This apparently was done to protect the account manager at PDC's former client, with whom Porter was romantically involved. As a result of PDC's discovery it has solid evidence that Porter not only misappropriated PDC's client and its proprietary information, but then entered into an agreement on settlement terms which would have allowed Porter to escape **all liability** to PDC if Porter just made full disclosure. This deposition transcripts clearly show that he refused to do so.

The above facts show that PDC has taken a number of steps to move this case forward and in fact has practically moved discovery forward as far as is practicable when Porter's stonewalling is taken into consideration, and with its discovery efforts has brought the issue of Porter's liability on the merits to a conclusive determination and with

those discovery efforts has also brought Porter's liability for breach of his obligations under the agreement on settlement terms into clear focus. Thus, it is evident that under the first three factors stated in Hartford Leasing PDC has engaged in substantial conduct to move the case forward, but has had no greater opportunity than Porter to move the case forward and yet PDC has obtained substantial results in moving the case forward.

When applied to Porter, the picture is much more bleak. Although Porter has had an equal opportunity to move the case forward, he has done nothing. Instead, Porter although immediately aware of the outcome of the April 4, 2006 Order to Show Cause hearing[28] did nothing until PDC filed a certificate of readiness for trial, and then in response to that certificate of readiness for trial erroneously objected to it by, in substance, complaining that Porter had failed to file an answer, had failed to seek the entry of a scheduling order and had failed to conduct any discovery on PDC's claims. In his objection Porter laid all of this at the feet of PDC by mis-characterizing to the trial court that it was PDC's sole obligation to inquire into the enforceability of the agreement on settlement terms and by mis-characterizing that PDC was solely responsible for the delay from April 30, 2005 to April 4, 2006.

Recited below are some examples of that self-serving mis-characterization:

"Also, contrary to Plantiff's assertions, because of the settlement, there has been

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[28]His counsel called prior to the 9:00 a.m. hearing to state he had mistakenly gone to the Provo courthouse and was on his way. It a half hour drive from American Fork to Provo, and the court recessed the hearing for 45 minutes so that Porter's counsel could attend. He arrived just after the hearing had been concluded.

no discovery whatsoever on the merits of Plaintiff's claims."[29]

Plaintiff . . . moved to set aside the settlement agreement. That motion was denied.[30]

[T]he court stated that Plaintiff's affidavits raised issues of fact and, therefore, gave Plaintiff time-limited opportunity for discovery on whether settlement had been fulfilled and a time limited opportunity limited opportunity to file a dispositive motion on the issue."[31]

In fact, there are a number of other places in his memorandum in support of objection to the trial court where Porter repeatedly mis-characterizes this case as one where the Plaintiff was solely responsible for the delay that had accrued, and that the case had already been settled but that PDC nevertheless had the sole obligation to inquire into the enforceability of the agreement on settlement terms.

The glaring defect in the trial court's dismissing PDC's case against Porter is that it accepted these false claims by Porter when it ruled:

> "In reply the defendant contends that it has never been the defendant's burden of proof to challenge the settlement agreement, that a written agreement settlement agreement was entered into by the parties, it's always been the defendant's view view that the settlement agreement was in place, and that it would be the party seeking to set the settlement agreement aside that would have the burden of proof and the burden of moving the case forward. Having considered those arguments I find the, that the defendant's arguments have merit. The motion to dismiss is granted." R.732: page 23/

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[29]Def.Mem.Obj. p.2. Unfortunately, it appears that the clerk did not paginate as part of the record Porter's memorandum in support of his motion to dismiss. The motion is at R.682. In any event, this statement is false. As the above transcript excerpts show, PDC has done extensive discovery on the merits of its claims.

[30]Def.Mem.Obj. p.2. What Porter's counsel fails to mention is that the November 26, 2003 order denies Porter's motion as well. *See* R.732: page 14/ line 7.

[31]Def.Mem.Obj. p.2. Again, Porter's counsel omits the fact that the court imposed this obligation on both parties jointly. *See* R.623.

line 19 et seq.

As the November 26, 2003 order of Judge Davis clearly shows, both parties were equally charged with resolving the issue of whether the agreement on settlement terms was enforceable and in relying on Porter's mis-characterization of the status of the settlement agreement as a basis to dismiss the Plaintiff's complaint, Judge Pullan relied on representations that were clearly wrong. Not only did Judge Pullan err, by accepting Porter's characterization of the status of the agreement on settlement as being something that "was in place" the court's actions could be construed as overruling Judge Davis. But one district judge cannot overrule another acting district judge having identical authority and stature.[32]

As explained above, PDC's entry of a certificate of readiness in response to the trial court's April 4, 2006 order rendered the question of failure to prosecute moot. Once the question of failure to prosecute had became moot there could be no need to reconsider the November 26, 2003 ruling of Judge Davis, even if Judge Pullan could have properly done so. But PDC's motion to strike the Objection of Porter shows that Judge Pullan did not have discretion to overrule a coordinate judge on an order that had become law of the case.[33] So on at least two grounds, the law of the case doctrine and mootness, Judge Pullan did not have discretion to revisit the November 26, 2003 order of Judge Davis.

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[32]State v. Morgan, 527 P.2d 225 (Utah 1974). *See also* Mascaro v. Davis, 741 P.2d 938 (Utah 1987) where the court held that one district court judge cannot overrule another district court judge of equal authority even if prior judge relinquished all authority and jurisdiction in matter for reasons of judicial economy.

[33]R.695.

Further, once it is recognized that both parties had an equal obligation to litigate the enforceability of the agreement on settlement terms then the fourth factor in Hartford Leasing,[34] which is the prejudice imposed upon Porter by reason of the delay, is readily resolved. Porter was throughout this time well aware of the terms of the November 26, 2003 order which required him to conduct discovery on his claim that he had fully performed his obligations under the settlement agreement. He knew that he had conducted no discovery whatsoever in this case and that the only discovery had been conducted by PDC. In that light, the only prejudice that accrued to Porter as a result of the delay is prejudice which Porter imposed upon himself. Because he chose to forego discovery, Porter cannot be heard to make the ludicrous complaint that because of PDC's delay Mr Porter has not conducted discovery. It was because of Porter's delay that Porter did not conduct any discovery.

Moreover, Porter failed to make any showing to the trial court that anything had happened in those eleven months to impair his ability to prosecute his claim that he had fully performed his obligations under the agreement on settlement terms. There was no showing of the disappearance of witnesses, of documents or of any other evidence.

The final factor to be considered is whether injustice will result from the dismissal. As the court in Hartford Leasing stated "'Dismissal with prejudice . . . is a harsh and permanent remedy when it precludes a presentation of a plaintiff's claims on their

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[34]888 P.2d at 698.

merits.'"[35] Dismissal of PDC's claims because Porter has failed to conduct any discovery on his claim that he had fully performed his obligations under the agreement on settlement terms, is manifestly unjust because it punishes the Appellant/ PDC for Porter's default. For almost two and one half years prior to the April 4, 2006 show cause hearing, Porter knew of the November 26, 2003 order that specifically denied his motion to enforce the agreement on settlement terms, yet he did nothing. When at the April 4, 2006 OSC hearing the trial court properly directed that a certificate of readiness be entered or a scheduling order be entered, he did not seek the entry of a scheduling order entered, but instead waited to see if a Certificate of Readiness was filed. Then he objected to the filing of that Certificate of Readiness because, among other defaults by Porter, no scheduling order had been entered.

A trial court abuses its discretion if there is "no reasonable basis for the decision."[36] Under Hartford Leasing and a continuing line of cases back to Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.[37] the five factors applied in Hartford Leasing are the criteria to be applied in determining whether there was a reasonable basis for dismissing an action with prejudice. Those factors largely consist of a comparison of the conduct of the respective parties to the action. The analysis above shows that when each of those five criteria are applied to the procedural facts of this case,

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[35]Hartford at 700, *quoting* Bonneville Tower Condominium Mgt. Comm. v. Thompson Michie Assocs., Inc., 728 P.2d 1017, 1020 (Utah 1986).

[36]Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

[37]544 P.2d 876 (Utah1975).

Porter's case for dismissal is no more than a complaint that he has been dilatory.

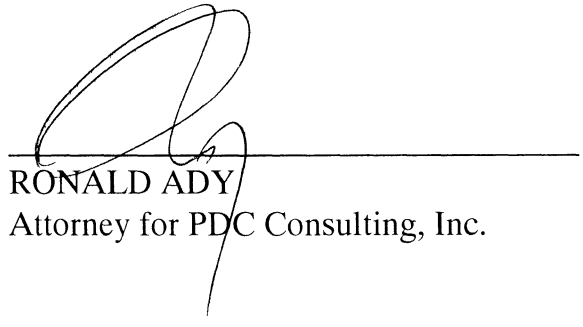
Although both parties conducted extensive motion practice on the issue of whether the agreement on settlement terms was enforceable, only PDC has conducted discovery which bears on that issue. And only PDC has conducted discovery which bears on the issue of the merits of this case. Porter has had equal opportunity and was given notice by the November 26, 2203 order, just as PDC was, that the enforceability of the settlement agreement was an issue to be resolved. It would be a harsh and entirely unjust outcome to dismiss PDC's claims because Porter does not want to go to trial on a record he for at least two and one half years knew would be the record unless he conducted further discovery. The trial court's reliance on Porter's mis-characterization as to the meaning and effect of the November 26, 2003 order and basis of the trial court's April 4, 2006 order was clearly without foundation in fact. Accordingly, the trial court abused its discretion in dismissing PDC's claims and that order of dismissal should be reversed.

VIII. CONCLUSION AND RELIEF SOUGHT

In making its April 4, 2006 order the trial court properly took into account the length of delay in prosecuting this case. A certificate of readiness was entered on the strength of that order. This rendered the issue failure to prosecute moot. There was no basis for reconvening the OSC hearing on August 10, 2006 and because there was no justiciable controversy before the trial court on that date, Porter's motion to dismiss was also moot. The April 15, 2001 agreement on settlement terms provide for the payment of

reasonable attorney fees and costs by the party breaching that agreement. PDC requests a ruling by this Court that the trial court erred in dismissing the Appellant's case with prejudice or, alternatively, abused its discretion. PDC further requests a ruling from this Court that it is entitled to an award of reasonable attorney fees and cost for this appeal.

RESPECTFULLY SUBMITTED this 9th day of October, 2007.



RONALD ADY
Attorney for PDC Consulting, Inc.

ADDENDUM:

A. Transcript of April 4, 2006 hearing

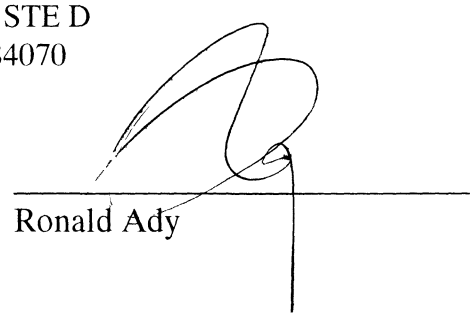
B. Transcript of August 10, 2006 ruling dismissing the case with prejudice.

C. Order dismissing the case with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing "Brief of The Appellant PDC Consulting, Inc." was mailed by the United States Postal Service on the 10th day of October, 2007 to the following:

Matthew Raty
9677 S 700 E STE D
Sandy, Utah 84070



Ronald Ady

Tab A

IN THE FOURTH JUDICIAL DISTRICT - AMERICAN FORK COURT

UTAH COUNTY, STATE OF UTAH

PDC CONSULTING, INC., PLAINTIFF, vs. JARED PORTER, et al, DEFENDANT.	ORDER TO SHOW CAUSE CASE 050100017 APPEAL 20060920-CA JUDGE DEREK P. PULLAN

BE IT REMEMBERED that this matter came on for hearing before the above-named court on April 4, 2006.

WHEREUPON, the plaintiff represented by counsel, defendant not present nor represented by counsel the followir proceedings were held:

OFFICIAL CERTIFIED TRANSCRIPT

(From CD Recording)

PENNY C. ABBOTT, REPORTER-TRANSCRIBER
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A-P-P-E-A-R-A-N-C-E-S

FOR PLAINTIFF:

RONALD W. ADY, ESQ.
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FOR DEFENSE (NOT PRESENT):

MATTHEW H. RATY, ESQ.
9677 S. 700 E. #D
SANDY, UT

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P-R-O-C-E-E-D-I-N-G-S

(April 4, 2006)

THE JUDGE: PDC Consulting, Inc. versus Jared Porter.

MR. ADY: Ronald Ady here for PDC Consulting, Your Honor.

THE JUDGE: Good morning. Is a, who contacted the clerk's office? And you went to Provo this morning?

MR. ADY: No, I didn't.

THE JUDGE: Oh.

THE CLERK: Oh, I'm sorry. It was Matthew Raty.

THE JUDGE: Matthew Raty. Okay. And is he counsel for the defendant I guess? Have you had any conversation with Mr. --

MR. ADY: No.

THE JUDGE: -- Raty? He contacted the court this morning and said he had inadvertently gone to Provo rather than to here so he is enroute. What time did he call, do you know?

THE CLERK: (Short inaudible, no mic),.

THE JUDGE: He should be here any minute.

THE CLERK: He should be here soon.

THE JUDGE: I'll give him, let's give him until quarter to. If he fails to appear we'll deal with it at that time.

Court will be in recess for a few moments.

(Recess).

THE JUDGE: Do we have any sign of Mr. Raty this morning?

MR. ADY: No.

THE JUDGE: I'll call the matter of PDC Consulting, Inc. versus Jared Porter. The record should reflect that counsel for Mr. Porter contacted the clerk a little after 9:00 this morning indicating that he had gone to the wrong courthouse, he had gone to Provo. It's now five to 10:00. There was ample time to appear and a, we've not seen him.

Mr. Ady, what is the status of this case?

MR. ADY: The status, Your Honor, last time we were here we were going to do some discovery and that never, I don't know what happened. I haven't had a chance to look in the file frankly. I had it on my calendar and came this morning. I'm currently involved in briefing two appeals at the same time and I, each of them my draft some far is 50 pages each which is the maximum. So frankly, I haven't looked at the file. But as I recall it there were still discovery issues.

And particularly from our side, the plaintiff's side we had brought a motion to set aside the settlement. Our view was that Mr. Porter hadn't complied with the

settlement agreement, that was executory and he hadn't complied with substantial terms. I know there had been argument on that and I know we had talked about discovery the last time around. And I don't think any further discovery has occurred.

THE JUDGE: I'm looking at a, an order on November 30th, 2004 ruling, so 18 months ago Indicates,

> A hearing was held on order to show cause. Plaintiff was represented by Mr. Ady and defendants by Mr. Raty..., or Raty ... having discussed the matter with counsel... It says ... it's hereby ordered the parties have 90 days from entry of this order to conduct discovery in regard to whether the parties have settled the case.
>
> Two, following the parties' 90 day discovery period in regard to whether the parties have settled the case the parties shall time any and all dispositive motions in regard to their settlement agreement.

And that, this must have been my case back then and it's been reassigned to me again. That's under my signature 2004. So that 90 day period has elapsed. And did that

happen?

MR. ADY: No.

THE JUDGE: Okay. And then there's an extension, there's an agreement for an extension of time to April 30th in the file, 2005. So looks like you've agreed to, to that you have time a, until April 30th to complete discovery. That a, stipulated extension remains in place. And a, I'll order that a notice of readiness for trial be filed after that. Sounds like you have some more time.

Then if I don't receive a certificate of readiness for trial or some other scheduling order by April 30th the case will be dismissed.

MR. ADY: Very well, sir.

THE JUDGE: Thank you, Mr. Ady.

WHEREUPON, the hearing was concluded.

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Tab B

IN THE FOURTH JUDICIAL DISTRICT - AMERICAN FORK COURT

UTAH COUNTY, STATE OF UTAH

PDC CONSULTING, INC., PLAINTIFF, vs. JARED PORTER, et al, DEFENDANT.	ORAL ARGUMENT CASE 150100017 APPEAL 20060920-CA JUDGE DEREK P. PULLAN

BE IT REMEMBERED that this matter came on for hearing before the above-named court on **August 10, 2006.**

WHEREUPON, the parties appearing through counsel, the following proceedings were held:

OFFICIAL CERTIFIED TRANSCRIPT

(From CD Recording)

PENNY C. ABBOTT, REPORTER-TRANSCRIBER
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SANDY, UT

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P-R-O-C-E-E-D-I-N-G-S

(August 10, 2006)

THE JUDGE: The court will call the matter of PDC Consulting, Inc. versus Porter. Counsel, will you state your appearances please.

MR. ADY: Ronald Ady here for the plaintiff PDC.

MR. RATY: Matthew Raty for the defendants, Your Honor.

THE JUDGE: All right. We're here on the defendant's motion to dismiss and objection to the certificate of readiness for trial. I've read the pleadings in support of the motion. I'll hear from you first, sir.

ARGUMENT BY MR. RATY

MR. RATY: Thank you, Your Honor.

As you noted we are here on the defendant's motion for dismiss and a, objection to the certificate of readiness for trial. And the first thing I need to note for the court is that the motion is unopposed. The motion was filed three months ago and submitted to this court for decision more than two months ago.

Now, this morning when I got to my office I found a fax from the plaintiff's attorney and that brief motion was titled something like a motion to strike defendant's motion to dismiss. But a, that's definitely untimely by at least

two months and under the rules should not be considered by the court.

In addition to those procedural rules why you should dismiss the case, let me take you through some important facts which also give you substantial reason under the law and under your discretion to dismiss the case.

The plaintiff's complaint, Your Honor, was filed on April 6, 2001, more than five years ago. And this case actually settled within 10 days of the complaint being filed. Mr. Ady who sits here at plaintiff's counsel table met with an attorney for the defendants and they sat down and hammered out a settlement agreement and they both signed it. And I've attached that to my pleadings which I've given to you.

Subsequent to that... And that was everyone's, of course, understanding that the case that settled. Subsequent to that as part of the settlement agreement a, Mr. Ady deposed the defendant Jared Porter for approximately 14 hours, so he could have obtained more names or try to look for some other entities to, to go after. These, these efforts by the plaintiff apparently proved fruitless. So the plaintiff at that point refused to a, enter a dismissal of the case as was contemplated and agreed in the settlement agreement.

So at that point, a, the plaintiff moved to set

aside the settlement. That motion was filed two years after the complaint had been filed, two years after the case had settled, and that was filed on May 9, 2003. Judge Davis, your predecessor, heard that motion to set aside the settlement agreement filed by the a, the plaintiff. And I think I've attached that also--

THE JUDGE: You have.

MR. RATY: -- for your review. But one thing said he said was, or his decision was a lengthy evidentiary hearing is probably implicated, that experts would need to be employed, and that each party may need to seek new legal counsel. Now, he said that because Mr. Ady and the defendant's previous attorney were both witnesses to the settlement agreement and, and had filed affidavits disputing a, whether the settlement had in effect been fulfilled. So a, that's what he said at that time.

The plaintiff did nothing over the next year, entire year subsequent to Judge Davis's ruling to challenge the settlement. And so on November 30th, 2004 the court scheduled an order to show cause. Oh, and by the way, Judge Davis as you probably noted, also a, put in his opinion that the plaintiff had done nothing for two years on the case and offered no explanation for his delay.

So then, you know, a year and a half or so passed and we had this November 30, 2004 hearing with you, order to

show cause over in Provo. And a, at that point you noted the history and a, that the settlement dispute had never been resolved. You gave the plaintiff 90 days to do discovery on the settlement issues and file any and all dispositive motions in regard to the settlement agreement.

Now the plaintiff didn't do anything during that 90 day period, no discovery on the settlement issues, and didn't file any motion.

At the end of that 90 day period I got a call from Mr. Ady asking me to give him a 60 day extension for him to do that discovery on the settlement issues and to file any motion he may want to file on the settlement. But again during that 60 day period the plaintiff did absolutely nothing.

And then after that, Your Honor, a whole other year passed with the plaintiff doing nothing on the case. And so you scheduled another order to show cause for April 4th, 2006 of this year.

And a, I need to apologize to you because I went down to the Provo court wrongly assuming you were still down there for that hearing. And a, you know, I was going to explain all of this to you at that time and explain that, you know, there's been five years this case hasn't been prosecuted by the plaintiff, and he never challenged the settlement again, which it was his burden to do. And a,

unfortunately I went to the wrong court. I called your clerk or one of your clerks, told them I would get over here as quickly as I could and I did that. As I walked in the door you had just concluded a, a hearing with Mr. Ady for the plaintiff and you were walking into your chambers. So a, I missed that hearing and I apologize for that.

I did get a tape of the hearing to see what had been said. And the most significant thing I thought in that hearing that you had with Mr. Ady was your misimpression of a stipulation between the parties. And I know I've given you a lot of dates and a lot of history so I don't want to be confusing about this.

But taking you back to your first order to show cause in November of 2004 you gave the plaintiff 90 days to do that discovery on settlement and file dispositive motion. At the end of that you'll remember I told you I agreed to a 60 day extension for the plaintiff and that extension was until April 30, 2005. But with your, in your hearing with Mr. Ady just a few months ago you said your understanding was that my stipulation ran through April 30, 2006.

THE JUDGE: And I think you're right about that.

MR. RATY: Okay.

THE JUDGE: I think that that was a mistake.

MR. RATY: Okay. And I think this all could

have been avoided. And I apologize again if I just would have come to the right court.

THE JUDGE: That happens.

MR. RATY: But then to my great surprise the, the plaintiff filed a certificate of readiness for trial and, and stated to the court that all the required pleadings had been filed in this case, discovery had been completed, and that there had been no settlement. All those statements were incorrect, Your Honor.

Because this case settled and that was never overturned there's never been an answer filed, Judge Davis made it clear that until we resolved this settlement issue a, this, any litigation was not going to go forward on this case. That was a hurdle or a bar that if he wanted to challenge he could have done that and a, if he prevailed then we could have got into litigation on the case. But there's never been an answer filed. There's been no attorney planning meeting, there's been no initial disclosures, the plaintiff has not filed any initial disclosures, there's never been a scheduling order that would allow me to a, begin discovery on the case.

And there, you know, I know this case settled and you're not going to just dismiss it today because of the, the failure to prosecute the case, and you ultimately wind up saying there was no settlement, then I've got loads of

litigation to do on this case

But a, I would ask you to dismiss it because number one, the plaintiff had the burden of prosecution on this matter. He's had numerous opportunities to challenge the settlement which took place over five years ago, he's, he's never done that. And a, more than one year has passed since I gave him that last stipulation to extent the time to challenge the settlement. And a, so that in and of itself is reasons to dismiss the case.

You're also well within the law and discretion to dismiss it because my motion to dismiss was unopposed by, by the plaintiff. We're here today on that. I filed it three months ago. I mailed it to him, I faxed it to him, I sent him a letter. He had every opportunity to challenge that motion to dismiss but he didn't do it. So there's a second independent reason you're well within the law and equity here to dismiss this case.

And, therefore, I would ask you to dismiss it.

Thank you, Your Honor.

THE JUDGE: Thank you very much, counsel.

Mr. Ady?

ARGUMENT BY MR. ADY

MR. ADY: Well, I suppose the first thing I would like to address, Your Honor, is the last hearing. I don't think the court's comment about April 30th, 2006, I haven't

listened to the tape like Mr. Raty, but I don't believe that that was a, I think that was a misstatement. I don't think it was something that, that the court, as I recall, it understood was correct. I think the court meant to say April 30th, 2005 when it said that as I recall it. Again I haven't listened to the tape like Mr. Raty has but that's, that was my impression.

Now, I understand Mr. Raty didn't appear at the last hearing for a reason that has befallen all of us. And I've gone to the wrong court on the wrong date before, so I certainly don't fault Mr. Raty for that. I've shown up in federal court and looked a little bit red faced because I was there on the wrong day.

But the proper procedure would have been for him I think to come back and a, renotice the hearing. He listened to the tape. The court in its minute entry said, was clear about what was to be done, file a certificate of readiness or a scheduling order. It was open to Mr. Raty to do the very thing that he complains of here and that is file a scheduling order. He didn't do that. He didn't take that opportunity given by the court. He was aware of it as he's admitted. And so I think a, instead he chose to dredge up something that is already the law of this case and he's asking the court to go back and overrule Judge Davis. And I've put in a very brief motion to strike his objection of

certificate of readiness for trial.

Mascaro (phonetic) versus Davis, which is the case pointing out that a coordinate judge simply doesn't have jurisdiction to overrule a judge on the same matter in the same case. The issue he brings before the court on this matter has already been decided.

In addition there is a statute that says, and I put that in the memorandum as well, that bars second applications. He's had his kick at the can on this matter. And so a, he's asking the court basically to go back and overrule Judge Davis, which is improper.

The, the problem... And he's, he's alleging that this issue of settlement hasn't been litigated. Well, if one looks at the procedural history recited in Judge Davis's order we've got April 9, 2003 defendant's motion to enforce, memorandum in support of motion to enforce. May 10th, plaintiff's motion to set aside settlement, plaintiff's memorandum in support. June 20th defendant' reply memorandum in support of motion to enforce. Affidavit of Jared Porter, affidavits by John Pate (phonetic), supplemental affidavit by Jared Porter. Notice to submit. Motion to extent time. My motion to strike, which is quite lengthy if one looks at the file, dealing with all of these affidavits, and a motion to strike. And then a court's hearing.

And so a, if the court is going to actually look at a, Mr. Raty's motion to dismiss I would submit that all those materials are properly before the court. And his argument that I simply haven't responded to that is in error. They're there. They're on the record. And I think it's clear that the affidavit evidence that they present is not sufficient on the basis of the motions and the memoranda I filed on September 25th. I would invite the court to consider those.

Secondly, Mr. Raty says that a, my motion to strike is untimely and that the court can't consider it. I beg to differ. I think that it's clear a, cases like a, Olsen versus Salt Lake County School District are, are very clear that a lack of subject matter jurisdiction can be raised at any time.

And this goes to the court's subject matter jurisdiction. I say that advisedly recognizing that I'm not arguing that the court doesn't have subject matter jurisdiction to deal with this case. But there's a federal court decision, and I wish I could recall it, if the court wishes me to supplement I will. It points out that what I'm really arguing is not that the court lacks general subject matter jurisdiction but there's a specific statutory bar and a specific precedent by the supreme court of this state that is a jurisdictional bar. And that's what I'm really arguing

here that the court is jurisdictionally barred and that that can be raised at any time. And that a, the statute is quite explicit.

And as I say, for Mr. Raty to say well we haven't, we've never really litigated this issue of this settlement agreement I think is simply wrong. You go back and look at the documents and the motions filed, and my memoranda that was filed, and they are not unsubstantial. We litigated this vigorously and at length, Judge Davis decided it. We were here on in April of this year, a certificate of readiness was entered pursuant to that. And as I say, Mr. Raty had the opportunity to either file a scheduling order. And at this point we've got the deposition of Mr. Porter and we're saying we're ready to go to trial on this case, we'll go, let's tee it up and get it done with.

Mr. Raty is arguing and saying well, 10 days after a, this complaint was filed this case was settled, and plaintiff has done nothing over these many years. Well, it's defendant here that has been trying to, that's been arguing that this should have been enforced, this settlement agreement. We said it should not have been.

And defendant has had full opportunity throughout all of this time to do all of the, the discovery. It hasn't done any of that.

And so I would submit to the court with due

respect that if defendant points a finger at plaintiff in saying you've delayed, there's three fingers on that hand pointing right back at defendant because it's delayed as well. And there's simply no basis for it to, to attack plaintiff and say well this delay by plaintiff, you should dismiss it because of delay by plaintiff.

Well, the defendant has been guilty of gross delay here, especially when since 2003 we've had Judge Davis's decision, defendant knew that it was an issue, and now it's jumping back and saying wait, I've got to do loads of discovery. And as I say, it had the benefit of this court's direction at the last hearing in April, file a certificate of readiness or file a scheduling order by April 30th, do one of those two things. Mr. Raty wasn't here at the hearing but he came in just as it closed. And he said he listened to the tape. He didn't move to file a scheduling order, he didn't, he didn't present one to me or the court. We filed our certificate of readiness.

And we believe, and we've moved before the court now we'd like to have a pretrial order, I've attached a proposed form to our motion, and we would like to get this matter set down for trial.

THE JUDGE: All right. Thank you very much.

Mr. Raty?

*

FURTHER ARGUMENT BY MR. RATY

MR. RATY: Thank you, Your Honor.

I did, as Mr. Ady has repeatedly stated, listened to the tape of your hearing with him. And a, and what you did was told Mr. Ady who, of course, as the plaintiff has the burden of prosecuting the case, you told him to file a scheduling or, file a scheduling order or a certificate of readiness for trial or you would dismiss the case. And again, that was under the misimpression you had that the stipulation was still in effect and had not ended a full year previous.

I talked to Mr. Ady after your hearing with him and asked him what he was going to do. Because as you walked into chambers and he walked out of the court I said well, what happened? And he, he said the judge told be I've got to file a scheduling order or certificate of readiness for trial or he's going to dismiss the case. And I said, well what are you going to do? And he said I don't know. And by that I understood him to mean that he was just going to drop the case because he hadn't done anything on it for years, or he would get a scheduling order and ask the court for more time to address these settlement issues. That was his burden, not mine.

I'm the defendant's attorney in this case. And by the way, he's a young man without financial resources, and

he's already incurred tens of thousands of dollars in litigation expenses in this case. And, you know, I'm under instructions to, to not incur more expense if at all possible.

And, you know, it's Horn Book law that he's the plaintiff, he has the burden of prosecution. And where he does nothing on the case the case should be dismissed. It's not, he's trying to, you know, in fact he says, you know, look at my fingers they're all pointing back at me. It's not my burden, you know. We thought this was a frivolous case all along. The case settled over five years ago. It's in my mind absurdly been a... The plaintiff has not complied with what it agreed to do in this the settlement and dismiss the case when we complied, which we did, with the settlement terms.

And so I'm in kind of a catch 22. Do I try and generate a lot more fees for my poor client to pay a, and push this thing to a dismissal, which I did try to do, by the way, before but Mr. Ady filed an affidavit swearing that a, things had not been done which we said had been done in the, in the settlement. So it is a catch 22. It's very expensive for my client and he's without recourses (phonetic). We don't have the burden of prosecution, he does.

And a, you know, by filing that, that came as a

complete surprise. Because as you know there's been no a, litigation of the merits of his complaint, it's all been on the issue of the settlement. So it came as a complete surprise to me that he would actually by bold enough to file a certificate of readiness for trial when there's been no discovery. He's not even filed initial disclosures, no attorney planning meeting, no answer.

So, you know, he's trying to blame me for this but it's, it's his case that he filed originally. The case was settled, that's always been our position. And if he wanted to get rid of that settlement it was his duty to do something about it.

Now he says well, I didn't have to respond to Mr., I didn't have to respond to the defendant's motion to dismiss because a, all these issues were brought before the court three years ago before Judge Davis. But a, what he's not telling you there is he's done anything since Judge Davis looked at all of those issues and made his ruling and said there's disputes of fact here, you're going to have to do discovery on these settlement disputes, you probably need to hire new attorneys because Mr. Ady is a witness. And a, he's done absolutely nothing on these settlement issues since Judge Davis made that ruling. And since you gave him another chance and I gave him another chance he's done nothing to challenge the settlement.

So the things he was reading you from Judge Davis's ruling, those were all things that, that came before his November 2003 ruling, not things that have come after. He's done nothing on the case.

He did not respond to the motion to dismiss. And by the way a, he, he's telling Your Honor that my motion to dismiss is trying to rehash the settlement issues which Judge Davis looked at. That's not what my motion to dismiss was about. The basis of by motion was that the plaintiff had not timely challenged a, the settlement following Judge Davis's ruling back in November 2003, and he's done absolutely nothing on the case otherwise whether, with the settlement or otherwise.

That was the grounds for my motion to dismiss. He didn't oppose it and Your Honor should, and I request, I think we've suffered long enough with this, and I request that you dismiss the case with prejudice at this point.

Do you have any questions, Your Honor?

THE JUDGE: I don't.

MR. ADY: I appreciate it. Thank you, Your Honor.

THE JUDGE: Thank you.

MR. ADY: I'd like to briefly reply, Your Honor.

THE JUDGE: I don't think there's anything new raised, counsel. Is there something new that was raised in

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Do you have any questions, Your Honor?

THE JUDGE: I don't.

MR. ADY: I appreciate it. Thank you, Your Honor.

THE JUDGE: Thank you.

MR. ADY: I'd like to briefly reply, Your Honor.

THE JUDGE: I don't think there's anything new raised, counsel. Is there something new that was raised in

rebuttal?

FURTHER ARGUMENT BY MR. ADY

MR. ADY: He's saying that his motion goes beyond Judge Davis's order. And our point simply is that I don't believe it does and that our September, and our September 25th motion and memorandum is on the file, it's on the record, it's there. It's never been disposed of.

THE JUDGE: Okay. Thank you. Can you hear me today?

MR. RATY: I can hear you fine.

THE JUDGE: Is that right? Maybe it's me who is losing my hearing. It's possible.

COURT'S RULING

THE JUDGE: This case comes before the court on the defendant's motion to dismiss for failure to prosecute and also motion to strike or objection to the certificate of readiness for trial filed by the plaintiff in this matter.

Initially I want to deal with the question of this court's order to show cause conducted on April 4th, 2006. On that date the court held an order to show cause hearing to determine why this case should not be dismissed for failure to prosecute. Mr. Ady appeared on behalf of the plaintiffs. Is it Raty?

MR. RATY: Raty.

THE JUDGE: Mr. Raty did not appear that date. He had mistakenly gone to the Provo courthouse.

The court called the matter. Because we were at an order to show cause status, a, counsel who has no objection to the case being dismissed need not appear. The plaintiff had appeared.

And having reviewed the case file in preparation for today's hearing I do concur with Mr. Raty that the court was under the misimpression that the parties had stipulated to a continuance of discovery to April 30th of 2006. Having reviewed the file that is clearly a misimpression on my part. And I'll go through those facts in a minute.

Unfortunately, that series of events required the defendant to file the present motion to address matters that were unable, he was unable to present at the order to show cause hearing.

No timely response was filed to that motion. The court has received a faxed a, motion to strike the defendant's motion today. The reason that I scheduled an unopposed motion to dismiss for hearing was because that it, it is dispositive of the case, and also to give both parties an opportunity to appear and to discuss the issues that could have been presented at the order to show cause hearing in April of 2006 but were not because of a, counsel's traveling to the wrong courtroom by mistake.

As I said, I have had a chance to review the case history.

The complaint was filed in April of 2001 and a settlement, a written settlement agreement was reached between the parties on April 15th, 2001. Pursuant to that settlement agreement I believe the parties, it's undisputed that the defendant submitted to a lengthy deposition.

Approximately two years passed, well, more than two years. And in November of 2003 the plaintiff moved to set aside the settlement agreement. Judge Davis heard that motion and ultimately issued a ruling dated November 3rd of 2003. Having considered that ruling it was Judge Davis's determination that,

> A lengthy evidentiary hearing is probably implicated, that experts would need to be employed, and that each party might need to seek new legal counsel.

The court further found that,

> Genuine issues of material fact existed, and that neither party was entitled to judgment as a matter of law pursuant to Rule 56 of the Utah Rules of Civil Procedure.

The court also noted,

This case has been inactive for over two years, even though plaintiff claims that material breaches of the settlement agreement by defendant occurred as early as June and July of 2001. Plaintiff has offered no explanation for this delay.

The next hearing occurred almost, a little more than one year later on November 30th, 2004. The case had been reassigned to this court at that time. The court issued and order to show cause why the case should not be dismissed for failure to prosecute. At that time the court ordered that the parties file any and all dispositive motions relating to the viability of the settlement agreement within 90 days of November 30th, 2004.

Counsel by stipulation extended that 90 day period for an additional 60 days and that period would have closed on April 30th, 2005.

The next hearing was scheduled one year from the expiration of that date on April 4th, of 2006 for order to show cause. And as I indicated, I believe that I was under the misimpression that the parties had stipulated to an extension to April 30th of 2006, and based on that misimpression I ordered that the plaintiff file a scheduling order or file a certificate of readiness for trial by that date.

The defendant moves to dismiss this action for failure to prosecute based on that record. He contends that the plaintiff has had ample opportunity in which to challenge the settlement agreement, that the court has granted extensions to the plaintiff to allow that to happen, that the defendant has granted extensions to allow that to happen, and that no evidentiary hearing has ever been scheduled and no discovery has ever been completed as to, well, no evidentiary hearing has ever been held as directed by Judge Davis as to whether the settlement agreement was breached or not.

The plaintiff has appeared today and contends that the, that the motion requires a reassessment of Judge Davis's November 2004 ruling, and that it would be inappropriate for this court to in effect grant a viability to the settlement agreement when Judge Davis has previously ruled that a, genuine issues of fact would preclude such a ruling.

In reply the defendant contends that it has never been the defendant's burden of proof to challenge the settlement agreement, that a written settlement agreement was entered into by the parties, it's always been the defendant's view that the settlement agreement was in place, and that it would be the party seeking to set that settlement agreement aside that would have the burden of proof and the burden of

moving the case forward.

Having considered those arguments I find the, that the defendant's arguments have merit. The motion to dismiss is granted. And I will look to you, Mr. Raty, to prepare an order consistent with that decision.

MR. RATY: Thank you Your Honor. And that is with prejudice, is it not?

THE JUDGE: It is.

MR. ADY: Your Honor--

THE JUDGE: It's to dismiss for failure to prosecute.

MR. ADY: -- for the sake of clarifying the record and in the interest of judicial economy, is the court saying that the plaintiff is guilty of failure to prosecute generally or is it the court's finding that the plaintiff has failed to prosecute the issue of whether or not the settlement agreement was enforceable?

THE JUDGE: I've made a detailed record of the facts. And the motion to dismiss for failure to prosecute is granted.

MR. RATY: Thank you, Your Honor.

THE JUDGE: Thank you. Court is in recess.

MR. ADY: Could I put another thing on the record, Your Honor, for the sake of the record?

THE JUDGE: If you want to make a record. I don't

intend to readdress my factual statements.

MR. ADY: Very well.

THE JUDGE: So make your record, Mr. Ady.

MR. ADY: For the record, Your Honor, with respect, if the court is saying that the plaintiff hasn't prosecuted the case generally, there's nothing in here in the defendant's memorandum and motion which addresses those issues and there's no case authority cited. He simply hasn't briefed the argument. And so I would submit it's not before the court.

As to the issue of whether or not plaintiff has failed to prosecute the issue of the settlement agreement, for the record we would also argue that the motion and memorandum fails to put that properly into issue.

As I understood his motion it was a motion that sought basically to say there's, there's an outstanding settlement agreement, you've never moved to set that aside or challenge that, the issue has been outstanding too long, therefore, dismiss this case. That to me is the motion that I read.

And as I pointed out to the court previously, it's our position the court has no jurisdiction and that a, once again the defendant has simply failed to brief that issue, cites no case authority in support of that issue if that in fact is the issue that he was arguing. And we would submit

that there's simply nothing before the court to rule on or at the least there's no adequate argument before the court if that is the issue.

Thank you.

THE JUDGE: All right. Thank you for that supplemented record. Court's in recess. Thank you.

WHEREUPON, the hearing was concluded.

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded copy CD #0651PCR1 in the matter of PDC vs. Porter, hearing date August 10, 2006, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 26, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 16th day of May, 2007.

PENNY C. ABBOTT, COURT REPORTER/NOTARY
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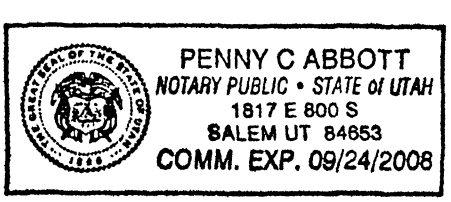
Notary Public, Comm Exp 9-24-08



Tab C

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FOURTH DISTRICT COURT, UTAH COUNTY

AMERICAN FORK DEPARTMENT, STATE OF UTAH

PDC CONSULTING, INC., Plaintiff, v. JARED PORTER, and JARED PORTER, dba CELL INTERACTIVE, and JARED PORTER dba CELLDESIGN; and DOES 1 through 10, Defendants.	**ORDER DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE** Case No. 050100017 Judge Derek P. Pullan

On August 10, 2006, at approximately 11:30 a.m., Defendants' Motion to Dismiss and Objection to Certificate of Readiness for Trial came before the court for hearing. Plaintiff was represented by its counsel, Ronald Ady, and Defendants were represented by their attorney, Matthew H Raty. Having reviewed the memoranda filed in support and in opposition to Defendants' motion, having heard the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss is granted. Plaintiff's Complaint is dismissed with prejudice for the reasons stated by the court in the August 10, 2006 hearing, including, but not limited to, the following:

1. Plaintiff failed to prosecute the case.

2. Plaintiff failed to timely renew its denied motion to set aside the parties' April 15, 2001 settlement agreement within the dates and extensions given by court and opposing counsel to renew the motion.

3. Plaintiff failed to timely oppose Defendants' motion to dismiss.

DATED this 6 day of Sept., 2006.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH

Honorable Derek P. Pullan
District Court Judge